Maju-TH Sdn Bhd (Lembaga Tabung Haji, proposed intervener)

HIGH COURT (KUALA LUMPUR) — ORIGINATIG SUMMONS NO WA-28JM-8–03 OF 2024
SAHERAN SUHENDRAN JC
2 SEPTEMBER 2024

Companies and Corporations — Judicial management — Application to intervene by shareholders — Whether shareholders had sufficient interest in judicial management application ('JMA') — Whether shareholders had an interest in remedies of JMA — Whether shareholders had right to be heard on JMA — Whether application of proposed intervener ought to be granted

Maju-TH Sdn Bhd ('Maju-TH'), a wholly owned subsidiary of ASM Development Sdn Bhd ('ASM') owned a substantial piece of land ('the land'). Maju-TH and Lembaga Tabung Haji (the proposed intervener), entered into a joint venture ('JVA') to develop and construct a commercial building ('the project') on the land. For this purpose, ASM sold 49% of Maju-TH, to the proposed intervener for RM45.57m. A joint venture agreement and a share sale agreement were executed between Maju-TH and the proposed intervener. The proposed intervener was now a shareholder of Maju-TH; but not a creditor. It was the proposed interveners allegation that: (a) the said agreements provide that management and control of Maju-TH would vest in ASM although the proposed intervener would have representation in management; and (b)Maju-TH would design and manage the project; but it failed to develop the project and used the land as a car park. As such, the proposed intervener claimed that the substratum of the JVA failed. The proposed intervener then commenced winding-up proceedings against Maju-TH on the just and equitable ground under s 465(1)(h) of the Companies Act 2016 ('Act') ('the winding up'). On the contrary, Maju-TH filed a judicial management application ('JMA') vide ex parte originating summons for Maju-TH to be placed for six months pursuant to ss 404 and 405 of the Act. Subsequently, the proposed intervener filed the intervener NoA raising issues that went to the merits of the JMA, namely, the bona fides of Maju-TH in filing the JMA, claiming that it was filed for the improper purpose of hindering the winding up. The issue that arose for determination was whether shareholders had a sufficient interest in a JMA so as to give them a right to be heard thereon and thus, a right to intervene.

Held, allowing the application:

(1) A distinction must be drawn between the right to apply and a right to be heard. While ss 404 and 405 only give a creditor the right to apply for a JM, it did not follow that a shareholder could never have a sufficient interest to be heard on the JMA. The need to serve the JMA and the JM's proposals on members again suggested that the Act recognised that a shareholder had an interest in the JMA. Indeed, the right to attack the conduct of the appointed judicial manager under s 425(1)(a) for being unfairly prejudicial to the rights and interests of the members again suggested a right of members to question the conduct of a judicial manager and therefore, the JM itself. Therefore, there was no provision in the Act that excluded shareholders from being heard on a JMA (see paras 32 & 34–36).

(2) Maju-TH stated that the judicial manager would formulate a 'financial management exercise' whereby the land would be sold (probably in a managed sale) to repay creditors. This statement suggested that the JM proposal anticipated the rehabilitation of Maju-TH with some return or benefit to the shareholders. Given the anticipated benefit to shareholders (and the possibility of a surplus after the payment of the creditors), it seemed obvious that an insolvent liquidation was not inevitable nor had Maju-TH reached irreversible insolvency. In substance, this surplus, gave the proposed intervener an interest in a JM. Such tangible benefit meant that the proposed intervener would have a legal interest in the proposed JM and thus, a right to be heard (see paras 75–76 & 78).

[Bahasa Malaysia summary

Maju-TH Sdn Bhd ('Maju-TH'), anak syarikat milik penuh ASM Development Sdn Bhd ('ASM') memiliki sekeping tanah yang besar ('tanah tersebut'). Maju-TH dan Lembaga Tabung Haji (pencelah yang dicadangkan), memasuki satu usaha sama ('JVA') untuk membangunkan dan membina bangunan komersial ('projek tersebut') di atas tanah tersebut. Untuk tujuan ini, ASM menjual 49% daripada Maju-TH, kepada pencelah yang dicadangkan pada harga RM45.57 juta. Perjanjian usaha sama dan perjanjian penjualan saham telah dilaksanakan antara Maju-TH dan pencelah yang dicadangkan. Pencelah yang dicadangkan itu kini merupakan pemegang saham Maju-TH; tetapi bukan pemiutang. Ia adalah dakwaan pencelah yang dicadangkan bahawa: (a) perjanjian tersebut memperuntukkan bahawa pengurusan dan kawalan Maju-TH adalah terletak pada ASM walaupun pencelah yang dicadangkan akan mempunyai wakil dalam pengurusan; dan (b) Maju-TH akan mereka bentuk dan menguruskan projek; tetapi ia gagal membangunkan projek tersebut dan menggunakan tanah tersebut sebagai tempat letak kereta. Oleh itu, pencelah yang dicadangkan mendakwa bahawa substratum JVA gagal. Pencelah yang dicadangkan kemudiannya memulakan prosiding penggulungan terhadap Maju-TH atas alasan adil dan saksama di bawah s 465(1)(h) Akta Syarikat 2016 ('Akta') ('penggulungan tersebut').

A Sebaliknya, Maju-TH memfailkan permohonan pengurusan kehakiman ('JMA') secara ex parte saman pemula untuk Maju-TH diletakkan selama enam bulan menurut ss 404 dan 405 Akta tersebut. Selepas itu, pencelah yang dicadangkan memfailkan NoA pencelah yang membangkitkan isu yang berkaitan dengan merit JMA, iaitu, bona fides Maju-TH dalam memfailkan
B JMA, dengan mendakwa ia difailkan untuk tujuan yang tidak wajar untuk menghalang penggulungan. Isu yang timbul untuk penentuan adalah sama ada pemegang saham mempunyai kepentingan yang mencukupi dalam JMA supaya memberi mereka hak untuk didengari dan dengan itu, hak untuk mencelah

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Diputuskan, membenarkan permohonan:

(1) Perbezaan mesti dibuat antara hak untuk memohon dan hak untuk didengar. Walaupun ss 404 dan 405 hanya memberi pemiutang hak
D untuk memohon JM, ia tidak bermakna pemegang saham tidak boleh mempunyai kepentingan yang mencukupi untuk didengari di JMA. Keperluan untuk menyampaikan cadangan JMA dan JM kepada ahli sekali lagi mencadangkan Akta tersebut mengiktiraf bahawa pemegang saham mempunyai kepentingan dalam JMA. Sesungguhnya, hak untuk
E menyerang kelakuan pengurus kehakiman yang dilantik di bawah s 425(1)(a) kerana secara tidak adil memudaratkan hak dan kepentingan ahli sekali lagi mencadangkan hak ahli untuk mempersoalkan kelakuan pengurus kehakiman dan oleh itu, JM itu sendiri. Oleh itu, tiada peruntukan dalam Akta yang mengecualikan pemegang saham daripada
F didengar mengenai JMA (lihat perenggan 32 & 34–36).

(2) Maju-TH menyatakan bahawa pengurus kehakiman akan merangka 'urusan pengurusan kewangan' di mana tanah itu akan dijual (mungkin dalam jualan terurus) untuk membayar balik pemiutang. Kenyataan ini mencadangkan bahawa cadangan JM menjangkakan pemulihan
G Maju-TH dengan sedikit pulangan atau manfaat kepada para pemegang saham. Memandangkan jangkaan manfaat kepada para pemegang saham (dan kemungkinan lebihan selepas pembayaran pemiutang), ia nampaknya jelas bahawa likuidasi insolvensi tidak dapat dielakkan dan Maju-TH tidak mencapai insolvensi yang tidak dapat dipulihkan. Pada
H dasarnya, lebihan ini, memberikan pencelah yang dicadangkan kepentingan dalam JM. Faedah ketara sedemikian bermakna bahawa pencelah yang dicadangkan akan mempunyai kepentingan undang-undang dalam JM yang dicadangkan dan dengan itu, hak untuk didengari (lihat perenggan 75–76 & 78).]

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Cases referred to

AGPS BondCo plc Strategic Value Capital Solutions Master Fund LP and others, Re v AGPS BondCo plc [2024] EWCA Civ 24, CA (refd)

Airasia X Bhd v BOC Aviation Ltd [2021] 10 MLJ 942, HC (refd)

Atlas Equifin Pte Ltd v Electronic Cash and Payment Solutions (S) Pte Ltd (Andy Lim and Others, Non-Parties) [2023] 3 SLR 900, HC (refd)
Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd [2021] MLJU 310, HC (refd)
Biaxis (M) Sdn Bhd, Re [2022] 7 MLJ 443, HC (refd)
BTI 2014 LLC v Sequana and others; Sequana v Bat Industries plc and others [2019] 1 BCLC 347, CA (refd)
BTI 2014 LLC v Sequana SA and others [2022] 3 WLR 709, SC (refd)
CIMB Bank Berhad v Jaring Communications Sdn Bhd [2016] MLJU 920, HC (refd)
Dan-Bunkering (Singapore) Pte Ltd v The Owners of The Ship or Vessel 'Pdz Mewah' (IMO No 9064009) of Port Klang & Anor [2020] MLJU 1574, HC (refd)
Deloitte & Touche AG v Johnson [2000] 1 BCLC 485, PC (folld)
Demeter O&G Supplies Sdn Bhd v Datuk Stephen Duar Tuan Kiat (as judicial manager of Scomi Oiltools Sdn Bhd and Scomi KMC Sdn Bhd) [2022] 9 MLJ 960, HC (refd)
Facilipack Industries Sdn Bhd, Re [2019] MLRHU 191, HC (refd)
Genesis Technologies International (S) Pte Ltd, Re [1994] 3 SLR 390, HC (refd)
Goh Siew Koon @ Eng Sing Kuan & Ors v Lim Jit Kim @ Lim Tian Jee & Ors [2015] MLJU 2229, CA (refd)
Goldpage Asset Sdn Bhd v Unique Mix Sdn Bhd [2020] MLJU 723, HC (folld)
Han Yeow Ming & Ors v Yu Chan Trading Sdn Bhd (in receivership) (Malayan Banking Bhd, secured creditor) [2022] MLJU 596, HC (refd)
Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit [2019] 8 MLJ 473, HC (refd)
Mansion Properties Sdn Bhd v Sham Chin Yen & Ors [2021] 1 MLJ 527, FC (refd)
Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd (21 July 2020) (unreported), CA (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)
Million Westlink Sdn Bhd v Maybank Investment Bank Berhad & Ors [2019] MLJU 1721, HC (refd)
Mytravel Group plc, Re [2004] EWHC 2741 (Ch) (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (folld)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)
Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors [2011] MLJU 1586, FC (refd)
The Whitehall Partnership Ltd; Taylor, Re v The Whitehall Partnership Ltd and another [2023] 1 BCLC 49, HC (refd)
Welfab Engineers Ltd, Re [1990] BCLC 833 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63, SC (refd)
Virgin Active Holdings Ltd and other companies [2021] EWHC 814 (Ch) (refd)

Legislation referred to

Companies (Corporate Rescue Mechanism) Rules 2018 rr 12, 13,
Companies Act 2016 ss 42(3)(a), 404, 404(a), (b), 405, 405(1), (1)(a), (1)(b)(i), (1)(b)(ii), 406(2)(b), 407(3), 410(a), 411(4)(e), 415A(3), 420, 420(2)(a), (2)(b), 421, 425(1)(a), (3)(c), 465(1)(h)
Interpretation Acts 1948 and 1967 s 17A

Nakeeran Kumar Kanthavel (Jasbeer Nur & Lee) for the applicant.
Neo Chi Chyn (Firoz Julian) for the proposed intervener.

Saheran Suhendran JC:

INTRODUCTION

[1] This application raises an important issue for which, as advised by counsel, there is no reported decision in Malaysia. The issue is whether shareholders have a sufficient interest in a judicial management application ('JMA') so as to give them a right to be heard thereon and thus, a right to intervene.

[2] On the application of the proposed intervener to intervene in the JMA ('the intervener NoA'), I granted the application. These are my reasons.

[3] The issue must be seen in the context of the interests of shareholders and creditors in a company in or verging on insolvency. This is necessary as s 404(a) and (b) of the Companies Act 2016 ('the Act') provides that a JMA may only be made to court on the pre-conditions that, inter alia, the company or a creditor considers that the company is or will be unable to pay its debts *and* there is a reasonable probability of rehabilitation or that the interests of the creditors would be better served than resorting to a winding up.

[4] Insolvency and rehabilitation are therefore the key drivers of a JMA and shareholder rights should be examined in this context. It may also be useful to examine such shareholder rights in other insolvency regimes such as an insolvent winding up and an insolvent scheme of arrangement.

The ordinary rule of the rights and interests of shareholders

[5] As part of this introduction, I start with the ordinary rule as to the interests of shareholders when the company is solvent. David Richards LJ in *BTI 2014 LLC v Sequana and others; Sequana v Bat Industries plc and others* [2019] 1 BCLC 347 (Court of Appeal England and Wales) held:

> [125] Companies registered under the Companies Acts are the principal medium through which business is carried on in this country. Businesses are for the most part

carried on for the purpose of making profits for their *shareholders* and business involves risk-taking, as all who deal with them know (or should know).

[126] Registered companies must have one or more directors and it is their function, subject to the provisions of the company's articles of association, to carry on the business of the company. They do so ultimately for the *benefit of the shareholders*, who have the power to appoint and remove directors. ...

[129] Any recognition at common law that consideration of the interests of creditors could in certain circumstances be an element in the duties of directors is remarkably recent.

[6] So, when a company is solvent, the rights and interests of shareholders are 'primary'. This was confirmed on appeal to the Supreme Court in the monumental decision of *BTI 2014 LLC v Sequana SA and others* [2022] 3 WLR 709 ('Sequana (SCt)'). Lord Reed, at [65], recognised that 'shareholder primacy' as a common law approach, was retained in the legislation.

'First, the primary duty imposed on directors by section 172(1) is expressed in terms of promoting 'the success of the company for the benefit of its members as a whole'. Accordingly, the duty is no longer expressed by reference to the interests of the company, and the previous problem of identifying the interests of an artificial person is side-stepped.

Since the duty under section 172(1) is focused on promoting the success of the company 'for the benefit of its members as a whole', it is clear that, although the duty is owed to the company, the *shareholders are the intended beneficiaries* of that duty. To that extent, the *common law* approach of *shareholder primacy* is carried forward into the 2006 Act.

[7] Further, in *Sequana (SCt),* 'shareholder primacy' was recognised by Lord Hodge at para [225]; and comprehensively, by Lady Arden at paras [243], [265], [332], [374], [375] and [386], noting the caveat that shareholder primacy does not completely override other interests.

[8] Under the English legislation, the rights of creditors are now formally recognised but only as residual claimants. While the legislation may have developed considerably, the common law approach to 'shareholder primacy' in a solvent company remains. Although shareholders do occupy a 'prime position', other claimants such as creditors, may diminish shareholder primacy. Shareholder interests indeed, actually 'vanish' altogether on irreversible insolvency, see paras 53 to 54 below.

[9] In Malaysia, when a company is solvent, the interests of shareholders remain 'prime' and the common law is not altered, see the Court of Appeal in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616 at p 654. However, when insolvency intrudes, the interests of creditors are now firmly recognised, see for example *CIMB Bank Berhad*

v Jaring Communications Sdn Bhd [2016] MLJU 920 at para [72] and *Dan-Bunkering (Singapore) Pte Ltd v The Owners of The Ship or Vessel 'Pdz Mewah' (IMO No 9064009) of Port Klang & Anor* [2020] MLJU 1574 at paras [92] and [93].

[10] It is in the context of these rights and interests, that shareholder rights in a JMA will be considered.

BACKGROUND FACTS

[11] Maju-TH Sdn Bhd ('Maju-TH') was a wholly owned subsidiary of ASM Development Sdn Bhd ('ASM'). Maju-TH owned a substantial piece of land held under HS (D) 3896 in the Mukim of Petaling ('the land').

[12] Maju-TH and the proposed intervener, Lembaga Tabung Haji, entered into a joint venture ('JVA') to develop and construct a commercial building ('the project') on the land. For this purpose, ASM sold 49% of Maju-TH, to the proposed intervener for RM45.57m.

[13] A joint venture agreement and a share sale agreement both dated 19 September 1995 were executed between Maju-TH and the proposed intervener. It is not disputed that the proposed intervener is now a shareholder of Maju-TH; but it is equally accepted that it is not a creditor.

[14] The proposed intervener alleges as follows. The said agreements provide that management and control of Maju-TH would vest in ASM although the proposed intervener would have representation in management; Maju-TH would design and manage the project; but it failed to develop the project and used the land as a car park. As such, the proposed intervener claims that the substratum of the JVA has failed.

[15] So, the proposed intervener commenced winding up proceedings against Maju-TH on the just and equitable ground under s 465(1)(h) of the Act, vide KLHC Companies (Winding Up) No WA-28NCC116–02 of 2022 ('the winding up').

[16] On 25 March 2024, however, Maju-TH filed an ex parte originating summons ('JMA') for Maju-TH to be placed under judicial management for six months pursuant to ss 404 and 405 of the Act. The JMA is supported by the affidavit of Datuk Mohamed Roslan bin Mohamed Shariff 25 March 2024 ('Maju-TH Aff1').

[17] It is not disputed that by s 410(a) of the Act, the very filing of the JMA stayed the winding up.

[18] At para 15 of Maju-TH Aff1, it is stated that there will be a better return from the assets in a JM than in a winding up.

[19] On 7 May 2024, the proposed intervener filed the intervener NoA. Each of Maju-TH and the proposed intervener filled main and reply submissions.

[20] During the hearing of the intervener NoA, the parties, by their oral and written submissions, raised issues that went to the merits of the JMA. For example, the proposed intervener attacked the bona fides of Maju-TH in filing the JMA, claiming that it was filed for the improper purpose of hindering the winding up. On the other hand, the proposed intervener claims that Maju-TH never suffered any financial constraint thus failing to satisfy s 404(a) of the Act; this was 'vehemently disputed' by counsel for Maju-TH (at para 4(c) and para 15 of encl 13).

[21] Ex facie therefore, the solvency of Maju-TH is disputed and neither party sought to establish the solvency (or insolvency) thereof at this stage. In the absence of conclusive evidence, such disputes, cannot be resolved in the NoA intervener. I will not deal with these issues at this stage and will leave them for the hearing of the JMA proper.

[22] I will only deal with the intervener NoA.

THE INTERVENER NOA

[23] The intervener NoA prays that the proposed intervener be added as a party to and be heard on the JMA, a statutory process. In *Deloitte & Touche AG v Johnson* [2000] 1 BCLC 485, the issue arose as to whether a contributory should be heard in an application to remove a liquidator. The Privy Council held:

> Where the court is asked to exercise a *statutory power*, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellants submit, that he 'has an *interest* in making the application or may be affected by its outcome'. It means that he has a *legitimate interest in the relief sought*. Thus, even though *the statute does not limit the category of person* who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see *Re Corbenstoke Ltd (No 2)* [1990] BCLC 60. This case was criticised by the appellants: their Lordships consider that it was correctly decided. The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) *does not limit the category of persons who may make the application*. The appellants, therefore, *do not lack a statutory qualification* to invoke the section. But the question

remains whether they have a *legitimate interest* in the relief which they seek.

[24] Thus, the approach to the intervener NoA is on two levels. First, whether there are any statutory limits to the persons to be heard at the JMA. Secondly, even if there are no statutory limits, the proposed intervener must have an interest in being heard on the JMA and an interest in the relief sought in the JMA.

The statutory provisions and the interest of shareholders

[25] The first level is essentially the subject of the main submission of counsel for Maju-TH, viz, that the JM statutory provisions themselves exclude shareholders from having an interest in the JMA and thereby, a right to be heard thereon.

[26] The thrust of his submission is that as the proposed intervener is merely a shareholder and not a creditor and the JM provisions in the Act only provide that the interests of creditors (and not shareholders) may be considered in granting a JMO. Thus, shareholders have been excluded by legislation. Primarily, counsel relies on ss 404 and 405.

[27] First, s 404 provides that the application for JM may only be made by a creditor or the company. No mention is made of 'members'. In *Han Yeow Ming & Ors v Yu Chan Trading Sdn Bhd (in receivership) (Malayan Banking Bhd, secured creditor)* [2022] MLJU 596 at paras [15] and [16], Nadzarin bin Wok Nordin JC (as he then was) accepted that a shareholder has no locus to *initiate* a JM application. Similarly, counsel argues that s 405(1) only gives a creditor locus to make the application.

[28] In this vein, I do accept that the majority of creditors may override a *nomination* of the judicial manager by the company (s 407(3). Further, by s 415A(3), any creditor may oppose an application by the JM for super priority for rescue financing. More importantly, by s 420, notice of the JM proposal must be given to the creditors and by s 421, it is the only creditors who may vote to approve the JM proposal.

[29] As such, counsel argues that the JM provisions do not provide for the voice of shareholders and only the creditors.

[30] I regret that I cannot accept this submission.

[31] I do accept that the Act makes the creditors the driving force behind a JMA. That is hardly surprising given that the Act provides that the company is or must be 'considered' likely to be insolvent before the JMA may be made, see ss 404(a) and 405(a).

[32] Notwithstanding the above, a distinction must be drawn between the right to apply and a right to be heard. While ss 404 and 405 only give a creditor the right to *apply* for a JM, it does not follow that a shareholder can never have a sufficient interest to be *heard* on the JMA.

[33] The following sections in the CA actually recognise that members may well have an interest in a JMA.

(a) under s 405(1), the members by a resolution may authorise the filing of a JM application;

(b) under r 12 of the Companies (Corporate Rescue Mechanism) Rules 2018 ('the Rescue Rules'), a copy of the JMA shall be served on a member on request;

(c) under s 420(2)(a) and (b), when a JM Order is made, the judicial manager must send a statement of his proposals to all members or allow the members to write for a copy of the statement. Under s 42(3)(a) any substantial revisions to the proposal must also be sent to the members;

(d) under s 406(2)(b), an application to extend the duration of the JM order must be served on all the members;

(e) under s 411(4)(e), no steps to transfer any share or to alter the status of any member shall be taken without leave of court. I cannot imagine that the shareholder would be prevented from being heard on the JMA on a proposal concerning his shares; and

(f) under s 425(1)(a), a member may make an application for an order on the grounds that the affairs or business is being managed by the JM in a manner unfairly prejudicial to the *interests of the members*. And under s 425(3)(c), the court may make an order requiring the summoning of a meeting of members for the purpose of considering such matters as the court may direct. This suggests that a member has the locus to attack the judicial manager, see *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473 at para [57](d).

[34] The need to serve the JMA and the JM's proposals on members again suggest that the Act recognises that a shareholder has an interest in the JMA. Why else would the Act provide that the JMA and proposal be served on the shareholders? A similar sentiment was expressed in the context of shareholders rights in a winding up; in *Atlas Equifin Pte Ltd v Electronic Cash and Payment*

Solutions (S) Pte Ltd (Andy Lim and Others, Non-Parties) [2023] 3 SLR 900, the Singapore High Court held:

> In fact, I agreed with Monica that r 69 prima facie confers a right on a shareholder/contributory to oppose any winding up application filed. Otherwise, why else would it be necessary for the *shareholder/ contributory to be provided with the documents* relating to the winding up application?

[35] Indeed, the right to attack the conduct of the appointed judicial manager under s 425(1)(a) for being unfairly prejudicial to the rights and interests of the members again suggests a right of members to question the conduct of a judicial manager and therefore, the JM itself.

[36] I cannot find any provision in the Act that excludes shareholders from being heard on a JMA.

Rule 13 of the Companies (Corporate Rescue Mechanism) Rules 2018

[37] Finally, although not raised by the parties, I should consider r 13 of the Rescue Mechanism Rules. Rule 13 provides:

> (1) The following person who intends to appear at the hearing of an application for a judicial management order to oppose the application shall serve the notice of intention to appear on the applicant or his solicitor:
>
> (a) any person who has appointed or is or may be entitled to appoint a receiver or receiver and manager under subparagraph 408(1)(b)(ii) of the Act; or
>
> (b) any secured creditor referred to in paragraph 409(b) of the Act.

[38] On the reading of r 13, it appears that a shareholder will have no right to be heard on the JMA. However, I gratefully rely on the reasoning of Nadzarin bin Wok Nordin JC (as he then was) in *Goldpage Asset,* that r 13 of the Rescue Mechanism Rules cannot exclude a creditor from being heard on the JMA, as such exclusion in the said Rules (being subsidiary legislation) would run counter to the parent Act, which makes no such exclusion. In *Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd* [2021] MLJU 310, His Lordship similarly held:

> Rule 13 of the Companies (Corporate Rescue Mechanism) Rules 2018, and in fact the entire Companies (Corporate Rescue Mechanism) Rules 2018 has to be read in conjunction with the parent act ie the Companies Act 2016, and that as the Companies Act *does not prohibit any creditor from being heard* at the JM and/or to oppose the JM, and based on my reasonings above on the right of any creditor to be heard, I hold that the *Companies (Corporate Rescue Mechanism) Rules 2018* being a Subsidiary Legislation cannot contravene the parent Act ie the Companies Act 2016 and thus the interveners may be heard in the JM application including to oppose the said JM.

[39] See the similar reasoning in determining that shareholders are not excluded from being heard on a winding up in Singapore in *Atlas Equifin*. As held in *Best Re (L),* the Rescue Mechanism Rules cannot exclude or limit rights or interests, where such exclusion is not provided for in the parent Act.

The Pegang Mining test

[40] The analysis does not end there. The proposed intervener must also show an interest in the JMA and the *relief* sought therein, see the Privy Council in *Deloitte & Touche AG v Johnson* (at para 23 above) and the test in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 ('the *Pegang Mining* test').

[41] The *Pegang Mining* test may be stated thus: whether the proposed intervener has a legal right or interest in the subject matter of the JMA and the remedies sought therein, see also *Deloitte & Touche AG v Johnson* and *Goldpage Asset Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723 at para [40], following *Pegang Mining Co Ltd*. In *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63, the Supreme Court in reaffirming the *Pegang Mining* test, held at p 65:

> It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* at pp 55–56. In that case, the Privy Council had formulated the test to determine whether a party's interests in the matter are 'legal' or merely 'commercial' in the following words (at p 56):
>
> > A better way of expressing the test is: will his *rights against or liabilities* to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in this action?

[42] The remedies sought in the JMA are for the appointment of a judicial manager over Maju-TH. And according to Maju-TH, the judicial manager will make a proposal to rehabilitate, see encl 13. The proposal will be made under s 420 for the survival of the company under s 405(1)(b)(i).

[43] Following *Pegang Mining* and *Deloitte & Touche AG v Johnson*, the issue is whether shareholders have an interest in the remedies of the JMA, which include proposals to be devised by the judicial manager.

The interest of a creditor in a JMA

[44] Before considering the interests of shareholders in a JMA, it will be worthwhile examining the decisions that hold that ordinary unsecured creditors have a right to be heard in a JMA.

[45] Nadzarin bin Wok Nordin JC (as he then was) held in two decisions that ordinary unsecured creditors had sufficient interest to be heard on a JMA, see *Goldpage Asset Sdn Bhd v Unique Mix Sdn Bhd* [2020] MLJU 723 and in *Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd* [2021] MLJU 310. His Lordship took a purposive approach in accordance with s 17A of the Interpretation Acts 1948 and 1967 and concluded that the Act did not specifically *exclude* a creditor from being heard in a JMA. He also held that the preclusion of the court's jurisdiction is not to be readily inferred. At para [36] of *Goldpage,* he cited the Federal Court in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 for the principle that the people should not be excluded from access to the courts and the right to be heard. He held:

> The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and *the people have a right*, unless expressly or impliedly debarred, to insist for *free access* to the courts of general jurisdiction of the state. (Emphasis added.)

[46] For the sake of completeness, I also refer to the decision of the Court of Appeal in *Maybank Investment Bank Berhad & Ors v Million Westlink Sdn Bhd* (21 July 2020) (unreported) (reversing *Million Westlink Sdn Bhd v Maybank Investment Bank Berhad & Ors* [2019] MLJU 1721). The Court of Appeal similarly held that ordinary unsecured creditors did have sufficient interest to be heard in a JMA:

> We have considered various provisions of the Companies Act 2016 as well as the Companies (Corporate Rescue Mechanism) Rules 2018. We take the faling (sic) position that the unsecured creditors had the right to be heard and oppose the hearing of the judicial management order (JMO).

THE INTEREST OF SHAREHOLDERS IN THE JMA

[47] The starting point is in this analysis is that in a fully solvent company, the interests of shareholders are 'prime' (see paras 6 and 7 above). Subject to restrictions in a company's Constitution and applicable legislation, the shareholders have (through the appropriate protocol) a large voice in the affairs of a solvent company. After all, a solvent company is managed for the benefit of its shareholders.

[48] Typically, it is insolvency that causes the rift between the interests of creditors and shareholders.

[49] So, where the company in a winding up is not insolvent, the shareholders will have a right to heard in the winding up, for example, on the removal of a liquidator, see the Court of Appeal *Goh Siew Koon @ Eng Sing Kuan & Ors v Lim Jit Kim @ Lim Tian Jee & Ors* [2015] MLJU 2229, the

Court of Appeal held:

> [49] As to the question of whether the removal of Mr LA is in the best interest of all those who are interested in the company being liquidated, we agree with the appellants that the only persons *who have a legitimate interest in the removal of Mr LA as liquidator are the persons entitled to participate in the ultimate distribution of the company's assets*, namely Sin Hai's creditors and contributories.
>
> [50] It is undisputed that the present case *does not involve an insolvent winding up. Therefore, the interested persons would be the contributories*: see the Privy Council case of *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605.

[50] Similarly, a shareholder may present a winding up petition if he can show the prospective existence of a monetary surplus or a tangible benefit after payment of the creditors, see *Re The Whitehall Partnership Ltd; Taylor v The Whitehall Partnership Ltd and another* [2023] 1 BCLC 49 at paras [38] to [42].

[51] However, prime shareholder interests in a solvent company will be diluted as the company approaches insolvency. This is because on insolvency, the interests of creditors intrude and in a broad sense, they are the true beneficial owners of the assets of a company.

[52] In short, the issue here is when will the dilution of shareholder interests become absolute so as to disentitle shareholders a right to be heard. Mere insolvency is not enough. The true position is more nuanced.

[53] In *Sequana (SCt),* the Supreme Court held that it is only when an insolvent liquidation was inevitable or insolvency irreversible, that the interests of the shareholders vanish.

[54] Lord Reed held at para [77]:

> ... If insolvent liquidation or administration is *unavoidable*, the interests of the shareholders drop out of the picture, and the company's interests can be treated as equivalent to those of the creditors alone.

And at para [80]:

> 80 ... It is only where an insolvent liquidation or administration is *unavoidable* that the shareholders *cease* to have any interest in the company, and their interests can therefore be *left out of account.*

[55] However, *short* of an inevitable insolvent liquidation, the interest of shareholders persist. Lord Reed at [81] said:

> 81 Where the company is insolvent or bordering on insolvency but is not faced with *an inevitable insolvent liquidation* or administration, the directors' fiduciary duty to act in the company's interests has to reflect the fact that *both the shareholders and the*

> *creditors have an interest* in the company's affairs. In those circumstances, the directors should have regard to the interests of the company's general body of creditors, as well as to the interests of the general body of shareholders, and act accordingly Where their interests are in conflict, a balancing exercise will be necessary.

[56] In this regard, the effect of insolvency is not binary. The greater the financial difficulty, the greater the intrusion of the rights of the creditors and the greater the dilution of shareholder 'primacy'. Lord Reed continued at [81]:

> ... Consistently with what was said in Kinsela at p 733 (para 33 above), and with the reasoning in paras 48-59 above, it can I think be said *as a general rule that the more parlous the state of the company the more the interests of the creditors will predominate*, and the greater the weight which should therefore be given to their interests as against those of the shareholders. *That is most clearly the position where an insolvent liquidation or administration is inevitable, and the shareholders consequently cease to retain any valuable interest in the company*.

[57] As such, mere insolvency is not enough. It is irreversible insolvency with 'no light at the end of the tunnel' and that when insolvent liquidation is inevitable, will the interests of the shareholders cease to exist. Lord Reed held at para [121]:

> 120 Insolvency takes two forms. Either may exist without the other The first is usually called balance sheet insolvency, where the value of the company's assets is exceeded by the value of its liabilities: see section 123(2) of the 1986 Act. The second is what is generally known as commercial insolvency, where the company is unable to pay its debts as they fall due: see section 123(1)(e) of the 1986 Act and the Cheyne Finance case. For present purposes what matters is that neither will necessarily be permanent, nor fatal to the long-term success of the company, although of course either may be, and commercial insolvency often is. A company may experience short-term commercial insolvency due to a temporary adverse balance between the liquidity of its assets and the maturity of its debts. Many start-up companies are balance sheet insolvent before a new invention or business product is sufficiently developed to be brought to market so as to generate revenue or goodwill value, and yet the company later becomes spectacularly successful, and its shareholders become millionaires. In both cases the directors may perceive that there is a reasonable prospect *that the company will be able to trade out of insolvency* for the benefit of *both creditors and shareholders*, a perception often labelled as seeing light at the end of the tunnel. ...

And at [164]:

> 164 Nor is it a duty, once engaged, always to treat creditors' interests as paramount. Section 172(3) speaks in the alternative of a duty to consider creditors' interests or a duty to act in accordance with them. Creditors are not to be treated as having the main economic stake in the company at least while a company is solvent or, *if insolvent, while there is still light at the end of the tunnel*. It is not enough to say that,

> once there is a risk of insolvency, the implicit risk that they as a class will get hurt in their pockets is a sufficient reason for elevating them to the status of *paramount stakeholders*, still less as a class whose interests must always predominate. It is inherent in the law's encouragement of risk-taking and commercial enterprise under limited liability that creditors of limited companies will get hurt from time to time. Most creditors are voluntary. They are therefore able to make their own judgment about those risks and to take such precautions against them by a demand for security as they think fit, armed with such public information about the financial position of the company as the law makes available, or the company chooses to provide.
>
> 165 It is only the *onset of liquidation itself, rather than insolvency* that converts the creditors into the main economic stakeholders in the company. That is why section 214 only imposes liability upon directors for failure to act in their interests once liquidation becomes inevitable. *That does make the creditors' interests paramount, butinsolvency itself may not*.

[58] In Lady Arden's perfectly crafted description, 'irreversible insolvency', is required before the interests of the shareholders vanish, see at paras [291], [306] and [311]. At [306] Her Ladyship said:

> 306 In my judgment, the interests of creditors can only supplant the interests of shareholders altogether when the company becomes *irreversibly insolvent* making insolvent liquidation or an administration unavoidable. I agree with Lord Reed PSC that the test of a real and not remote risk of insolvency and the test of likelihood of becoming insolvent should be rejected.

[59] In summary, the consensus of the Supreme Court is that it is only when an insolvent liquidation or administration (not just mere insolvency) was inevitable or unavoidable, or the company is irreversibly insolvent or colloquially put, when there is 'no light at the end of the tunnel', will the shareholders cease to retain any economic interest in the company, see for completion Lord Reed at paras [11], [50], [77], [81], [98]; per Lord Briggs and Lord Kitchin at paras [124], [165], [172]; and per Lady Arden at [291] and at [306], [321], [361], [449].

[60] Short of this, both the interests of the creditors and the shareholders *co-exist*. But when the shareholders cease to have any economic interest in the company, they will have no right to be heard.

The interests of a shareholder when rehabilitation is proposed

[61] These principles should also be examined in the context of an insolvent rehabilitation, such as in a scheme of arrangement or in our case, a judicial management.

[62] To rehabilitate companies is consistent with the 'modern' approach in insolvency law, which is to propose transactions which will save businesses and not destroy them, see Hoffman J (as he then was) in *Re Welfab Engineers Ltd* [1990] BCLC 833 at p 838. Lord Reed in *Sequana (SCt)* at para [62] referred to the Cork Committee Report (Cmnd 8558, 1982), which treated the salvage of the enterprise as a going concern, where possible, as one of the priorities of insolvency. Lord Reed observed that this approach reflected the good sense, both economically and socially, of keeping plant intact, avoiding redundancies, and preserving business connections.

[63] In the context of a scheme of arrangement, the Federal Court in *Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors* [2011] MLJU 1586 at para [43] confirmed that the scheme provisions under the Act for insolvent restructurings are designed to rehabilitate and save companies. And see also, the Federal Court in *Mansion Properties Sdn Bhd v Sham Chin Yen & Ors* [2021] 1 MLJ 527 at [26]. In *Airasia X Bhd v BOC Aviation Ltd* [2021] 10 MLJ 942 at para [27], Ong Chee Kuan J held:

> [27] The primary object of s 366 of the Act is to allow a struggling company or its creditors or members to propose a restructuring plan in order for the company to continue as a going concern.

Being 'Out of the Money'

[64] If the only alternative to the scheme (the comparator) is an insolvent liquidation, the shareholders, ranking after the creditors, will receive nothing. The shareholders would colloquially be said to be 'out of the money' or more precisely, they would have no economic interest in the scheme company and thus, no voice in the scheme.

[65] The effect of being 'out of the money' was considered in several decisions, in particular, *Re Tea Corporation*. In summarising the applicable principles in these asset transfer cases, Snowden LJ in *Re AGPS BondCo plc Strategic Value Capital Solutions Master Fund LP and others v AGPS BondCo plc* [2024] EWCA Civ 24 at para [249] held, referring to his own decision in *Virgin Active Holdings Ltd and other companies* [2021] EWHC 814 (Ch), that:

> 248. ... By this route, the *shareholders* and any creditors who would be out of the money in the formal insolvency would be left behind in the shell of the old company and the benefits of future trading would be enjoyed by those who would be in the money in a formal insolvency ...
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> 249. At [242], I summarised what I understood to be the established approach in such cases:
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> > 242. That established approach in relation to scheme cases reflects the view that where the *only alternative* to a scheme is a *formal insolvency* in which the business and assets of the debtor company would be held on the statutory trusts for

realisation and distribution to creditors, that business and assets in essence belongs to those creditors who would *receive a distribution* in the *formal insolvency*. The authorities take the view that it is for those creditors who are *in the money* to determine how to divide up any value or potential future benefits which use of such business and assets might generate following the restructuring.

[66] In *Mytravel Group plc, Re* [2004] EWHC 2741 (Ch), Mann J held:

45. The Company's case on this is as follows. It says that on a scheme of arrangement as a matter of principle it is not necessary to consult any class of creditors (*or shareholders*) who have *no economic interest* in the company. The votes of those who have no interest can and should be disregarded. ...

46. In support of the first limb of this reasoning (that those with no interest do not have any relevant status) he relied on *Re Tea Corporation* [1904] 1 Ch 12. In that case a scheme was proposed in a liquidation (the then equivalent of section 425 only applying when a company was in liquidation) and a meeting of, inter alia, ordinary shareholders was proposed. Under the proposed scheme they were to be given shares in the new company in place of their shares in the old, so to that extent they were affected by the scheme. The *shareholders* voted against the scheme; the other relevant participants voted in favour of it. On the hearing for *sanction* the scheme was held to stand. At first instance the amount of the company's assets was the subject of an agreement and that amount negatived as a fact the notion that there could be any return to shareholders, *so they had no financial interest*. The Court of Appeal held that in those circumstances the *vote* of the shareholders could be disregarded.

[67] In the scenario where shareholders in the comparator regime, receive no returns, their views will not be sought and no meetings of shareholders need be called. It is not surprising that when the comparator is an insolvent liquidation giving the shareholders no returns, they will have no right to be heard. This is entirely consistent with *Sequana (SCt),* where the Supreme Court held that the interests of the shareholders will only vanish in an inevitable insolvent winding up.

Shareholders' interests and the JM

[68] The final question is whether shareholders will have a sufficient interest in a company under judicial management so as to have a right to be heard on the JMA. When the company is to be rehabilitated under the JM, the question is whether the proposed rehabilitation will be sufficient to give shareholders an interest in the company so as to have a right to be heard in the JMA.

[69] The objects of judicial management are set out in ss 404 and 405. Under s 404, a JMA may be made if rehabilitation is a reasonable probability. And the court may make a JM order under s 405(1)(b)(i) if rehabilitation is likely. Section 405(1)(b)(i) provides that the court may make a JM order if:

(b) the Court considers that the making of the order would be likely to achieve one or more of the following purposes:

(i) the *survival* of the company, or the whole or part of its undertakingas *as a going concern*.

[70] The sections make it clear that a JM may be used to resolve the financial troubles of a company to ensure it survives as a going concern. As correctly submitted by counsel for Maju-TH (at para [16] of encl 13 citing *Re Facilipack Industries Sdn Bhd* [2019] MLRHU 191), that the JM provisions were introduced to rehabilitate companies. This seems to be the primary purpose of the JM provisions, see:

(a) in *Re Biaxis (M) Sdn Bhd* [2022] 7 MLJ 443, the court held:

> [3] The overall purpose of judicial management is to *temper the winding up of insolvent companies* where the circumstances allow for a better outcome for the creditors and/or the company.

(b) in *Demeter O&G Supplies Sdn Bhd v Datuk Stephen Duar Tuan Kiat (as judicial manager of Scomi Oiltools Sdn Bhd and Scomi KMC Sdn Bhd)* [2022] 9 MLJ 960, the court held:

> A liquidator's duties arise in the winding up of a company, while a judicial manager's duties arise pursuant to a judicial management order which is intended to *rehabilitate* companies in financial distress and to reduce cases of winding up (see *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473).

[71] So, when the purpose of a JM proposal is to ensure the 'survival' of the company as a going concern, this means that the company will be able to carry on business in the future, see *Leadmont* at para [42] Wong Chee Lin JC (as she then was). Hence, if the company is to be 'rehabilitated' the company will be returned to solvency and the interests of the shareholders will be revived.

[72] The nature of a rehabilitation was considered in Singapore in *Re Genesis Technologies International (S) Pte Ltd* [1994] 3 SLR 390. At pp 392–393, the Singapore High Court held:

> Judicial management is an alternative to winding up ... Its primary objective is to give the company a new lease of life as a going concern. It is, therefore, a device to save the company from creditors who may wish to destroy the company when it can be *rehabilitated* for the benefit *not only of the shareholders* but the unsecured creditors as well.

[73] The Singapore High Court relied on the equivalent of the Malaysian s 405(1)(b)(i) to show that the 'survival of the company' means the rehabilitation of the company for the benefit of, inter alios, the *shareholders*.

This suggests that the interests of the shareholders in a JM specifically designed to rehabilitate, will not be extinguished unless the JM ultimately failed and irreversible insolvency set in.

[74] In contrast, if rehabilitation was unachievable then ordinarily, the best value for the assets of the company would be sought so as to maximise returns to the creditors. This alternative appears to be within s 405(1)(b)(ii). In this scenario, on principle, it may well be that the shareholders will have no interest in the JM nor a right to be heard. However, I express no opinion of this alternative.

THE PROPOSED REHABILITATION OF MAJU-TH

[75] Counsel for Maju-TH, in his primary submissions (encl 13 at paras [14] and [15]) states that the judicial manager will formulate a 'financial management exercise' whereby the land will be sold (probably in a managed sale) to repay creditors. This, it is said (at para [17]), will be a *better option for the 'shareholder'* than a winding up. This statement suggests that the JM proposal anticipates the rehabilitation of Maju-TH with some return or benefit to the shareholders. Its reply submissions (encl 18 at para [7]) also demonstrates an intention to rehabilitate.

[76] Given the anticipated benefit to shareholders (and the possibly of a surplus after the payment of the creditors), it seems obvious that an insolvent liquidation is not inevitable nor has Maju-TH reached irreversible insolvency. Following *Sequana SCt* at para [81], the interests of the shareholders will not cease to exist nor can it be said that the shareholders and thus, the proposed intervener, will be 'out of the money' within *Tea Corporation.* Indeed, a monetary surplus or some tangible benefit in a winding up, is enough to establish locus, see *Re The Whitehall Partnership Ltd* at paras [40] to [42]. In substance, this surplus, as I understand counsel for the proposed intervener, gives the proposed intervener an interest in a JM.

[77] I agree.

[78] Such tangible benefit, will mean that the proposed intervener will have a legal interest in the proposed JM and thus, a right to be heard.

[79] In those circumstances, the proposed intervener should have a say in how the benefit or the surplus will be applied. It should also have a right to challenge MAJU-TH's insolvency and that Maju-TH has failed to meet the insolvency pre-condition in s 404(a).

A FINDINGS AND ORDER

[80] I therefore allowed the NoA intervention.

B **[81]** To hold otherwise would defy common sense. If Maju-TH were solvent, shareholder primacy would allow shareholders to have a say in how the surplus assets are dealt with. Accordingly, in the absence of proving irreversible insolvency, shareholders' interests would co-exist with that of the creditors. In those circumstances, it would be wholly unfair if the shareholders were wholly excluded from being heard on the JMA.

C

For these reasons, I granted an order in terms of prayers 1, 2(a), (b), (c) and 4 of encl 6.

D *Application allowed.*

Reported by K Selvaraju

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